

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

STANLEY HERBERT	:	CASE NO. C-1-00-855
	:	
Plaintiff,	:	Magistrate Judge Hogan
	:	
vs.	:	
	:	
MILFORD TOWING & SERVICE, INC.,	:	<u>PLAINTIFF'S RESPONSE</u>
et. al,	:	<u>TO DEFENDANT'S</u>
	:	<u>MOTION TO AMEND</u>
Defendants.	:	

Defendants seek leave to add an affirmative defense that plaintiff failed to mitigate his damages (Doc. 48). Their motion should be denied.

Failure to mitigate damages is an affirmative defense in employment discrimination cases. *Myers v. City of Cincinnati*, 14 F.3d 1115 (6th Cir. 1994). FRCP 15 allows the district court broad discretion to grant leave to either party to amend. *Zenith Radio Corp. v. Hezeltine Research Inc.*, 401 U.S. 321, 330, 91 S.Ct. 795 (1971). While this leave is generally given freely, it may be denied in cases where the court determines there is undue delay, bad faith, previous repeated failures to properly amend complaints, or undue prejudice. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227 (1962). “Untimeliness in itself can be sufficient reason to delay leave to amend, particularly when the movant provides no adequate explanation for the delay.” *Panis v. Mission Hills Bank, N.A.*, 60 F.3d 1486, 1495 (10th Cir. 1995). “No finding of prejudice to the opposing party is required.” *Woolsey v. Marion Laboratories, Inc.*, 934 F.2d 1452, 1492 (10th Cir. 1991).

In the present case Defendant offers no adequate explanation for his failure to plead this defense earlier, and instead merely states that “they have found that they have failed to plead an

affirmative defense.” This request is untimely, as it comes a mere two weeks before trial, and is unsupported by any valid reason. We request that the court use its discretion and deny the Defendant’s request to add an affirmative defense.

Respectfully submitted,

s/Robert F. Laufman
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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October, 2003, a copy of the foregoing Plaintiff’s Response to Defendants’ Motion to Amend was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of this Court’s electronic filing system. Parties may access this filing through the Court’s system. I further certify that a copy of the foregoing has been served by ordinary U.S. Mail upon all parties for whom counsel has not yet entered an appearance.

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